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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 321

KALTREIDER CONSTRUCTION, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. 5-13; R. 15a-23a)[1] is reported at 192 F. Supp. 229. The opinion of the court of appeals (Pet. 14-18) is reported at 303 F. 2d 366.

[1] "R. —" references are to appendix to the government's brief in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1962. The petition for a writ of certiorari was filed on August 10, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Taxpayer filed its 1952 income tax return on March 16, 1953, and paid the tax shown to be due. On March 16, 1956, taxpayer filed an amended return in which it showed an additional tax due for 1952 in the amount of $3,289 and on the same date paid this amount. On May 21, 1958, the court below decided in another case that the amount reported by taxpayer-corporation in the amended return should in fact have been reported and paid by its stockholders, as individuals. Section 322(b)(1) of the Internal Revenue Code of 1939 requires that a claim for refund must be filed "within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, * * * whichever of such periods expires the later." The questions presented are:

1. Whether the court below correctly held that the three-year limitations period for filing a claim for refund began to run from the date the original tax return was filed and not from the date the amended return was filed.

2. Whether the court below correctly held that the two-year limitations period for filing a claim for refund began to run from the date taxpayer made the

payment accompanying the amended return and not from the date the court below decided the question of the individual liability of taxpayer's stockholders.

STATUTES INVOLVED

Internal Revenue Code of 1939 (26 U.S.C., 1952 ed.):

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(b) *Limitation on Allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim

for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

* * * *

STATEMENT

On March 16, 1953, the taxpayer filed its federal income tax return for 1952, and paid the tax shown to be due (Pet. 15). On March 16, 1956, taxpayer filed an amended return for 1952 reporting additional income and showing an additional tax due in the amount of $3,289.69, which it paid on the same date (*ibid.*). At the time the amended return was filed and the additional tax paid, there was pending before the Tax Court the case of *Walter H. Kaltreider and Irene C. Kaltreider* v. *Commissioner*, in which the Kaltreiders, stockholders of taxpayer, were contending that an amount determined by the Commissioner to be includible in their income was taxable, not to them, but to the corporation. It was to reconcile the corporation's return to that contention that the amended corporate return was filed. On April 23, 1957, the Tax Court held that the disputed amount was taxable to the Kaltreiders as individuals.[2] The Tax Court's decision was affirmed by the Court of Appeals for the Third Circuit on May 21, 1958.[3]

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[2] 28 T.C. 121.

[3] *Kaltreider* v. *Commissioner*, 255 F. 2d 833 (C.A. 3). See Pet. 15.

On May 29, 1958, more than five years after the original return was filed, and more than two years subsequent to the payment of the additional taxes, the taxpayer filed a claim for refund of 1952 income taxes in the amount of $3,289.69 (Pet. 15; R. 5a, 7a). This was rejected by the Commissioner on the ground that the claim was not timely fixed (Pet. 15). Taxpayer then brought this suit for refund in the district court which held that the refund claim was timely filed and granted judgment in favor of the taxpayer (Pet. 5-13; R. 25a). On the government's appeal the court below reversed and remanded the case with directions to enter judgment for the government (Pet. 14-18).

ARGUMENT

The decision below is correct. There is no conflict present nor asserted and the "narrow and technical" point (Pet. 14-15) involved does not warrant further review by this Court.

Section 7422 of the internal Revenue Code of 1954, *supra*, pp. 3-4, provides that no suit for refund will lie until a claim has been filed. Section 322(b)(1) of the Internal Revenue Code of 1939, *supra*, p. 3, provides that a claim for refund must be filed "within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, * * * whichever of such periods expires the later." Taxpayer contends that its claim for refund was timely filed "within both of the alternate limitation periods" (Pet. 3).

There is no merit to taxpayer's assertion that the three-year period began to run from the time the amended return was filed on March 16, 1956. When a return required by law has been filed, the limitation period begins to run on that date and the filing of an amended return does not operate to extend the statute. 10 *Mertens, Law of Federal Income Taxation* (Rev.), Sec. 57.15.

2. There is no basis in the statute for taxpayer's contention that the refund claim was "premature" (Pet. 3) until the courts had determined whether taxpayer's stockholders were individually liable for additional taxes on their appeal from the adverse decision of the Tax Court (Pet. 15, 17). As the court below stated here, the question in that litigation was not the corporation's liability but rather that of its owners (Pet. 17). That separate litigation could not toll the statute running against the corporation's claim for refund. In any event the Tax Court's decision in April 1957 which held the individuals liable for the tax gave the taxpayer-corporation ample notice of its claim for refund a full eleven months prior to the expiration of the period for filing the claim.

Thus, the alternative two-year limitation period for filing a refund claim, commencing with the time the tax is paid, started to run here when taxpayer made the payment accompanying its amended return (March 16, 1956) and not when the court below decided the question of the individual liability of taxpayer's stockholders (May 21, 1958). Cases such as

Rosenman v. United States, 323 U.S. 658, involving tentative payments made under protest or placed in a suspense account have no relevancy. See *Hill* v. *Commissioner*, 263 F. 2d 885 (C.A. 3d).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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